



U.S. Department  
of Transportation  
**Federal Highway  
Administration**

# Memorandum

Subject: INFORMATION: Interim Guidance on the  
Use of 23 USC §139(l) Limitation on Claims Notices

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Reply to  
Attn. of: HCC-1

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HEP-1

To: Directors of Field Services  
Division Administrators  
Federal Lands Highway Division Engineers

Attn: Division Environmental Protection Specialists  
Federal Lands Highway Division Environmental Protection Specialist

The Federal Highway Administration (FHWA) is issuing this interim guidance on 23 USC §139(l). This guidance discusses publication of §139(l) notices for FHWA and other Federal agency actions on transportation projects. The information in this interim guidance is based on current perspectives on the new law and its administration. As experience with the application of the law provides new insights or presents new issues, the FHWA will update this guidance.

## Background

On August 10, 2005, the President signed into law the new surface transportation act, the "Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users" (SAFETEA-LU) (Pub.L. 109-59, 119 Stat. 1144). Section 6002(a) of SAFETEA-LU includes a provision limiting the time period for filing claims that challenge permits, licenses, or approvals issued by Federal agencies for a highway or public transportation capital project, such as transit (Pub.L. 109-59, 119 Stat. 1144, 1857). The provision creates a maximum statute of limitations period of 180 days. The text of the new law, codified as 23 USC §139(l), is reproduced below.



*Section 6002(a):*

*Sec. 139 Efficient environmental reviews for project decision-making*

*(l) Limitations on Claims.--*

*(1) In general.--Notwithstanding any other provision of law, a claim arising under Federal law seeking judicial review of a permit, license, or approval issued by a Federal agency for a highway or public transportation capital project shall be barred unless it is filed within 180 days after publication of a notice in the Federal Register announcing that the permit, license, or approval is final pursuant to the law under which the agency action is taken, unless a shorter time is specified in the Federal law pursuant to which judicial review is allowed. Nothing in this subsection shall create a right to judicial review or place any limit on filing a claim that a person has violated the terms of a permit, license, or approval.*

*(2) New information.--The Secretary shall consider new information received after the close of a comment period if the information satisfies the requirements for a supplemental environmental impact statement under section 771.130 of title 23, Code of Federal Regulations. The preparation of a supplemental environmental impact statement when required shall be considered a separate final agency action and the deadline for filing a claim for judicial review of such action shall be 180 days after the date of publication of a notice in the Federal Register announcing such action.*

## **Guidance**

The 180-day limitation period established by 23 U.S.C §139(l) applies to a permit, license, or approval decision by a Federal agency if:

1. The decision relates to a highway or public transportation capital project; and
2. A notice is published in the Federal Register announcing that Federal agencies have taken action that is final under the Federal law pursuant to which the action was taken.

If no notice is published, the period for filing claims is not shortened from what is provided by other parts of Federal law. If other Federal laws do not specify a statute of limitations, then a six-year claims period applies.

Section 139(l) is intended to expedite the resolution of issues affecting transportation projects. Whether a §139(l) notice is needed, or is the best way to achieve such resolution on a project, is a risk management decision. A determination should include consideration of the actual risk of litigation, and the potential effects if litigation were to occur several years after the FHWA National Environmental Policy Act (NEPA) decision or other Federal agency decisions. A §139(l) notice can be used for a highway or transit project regardless of the category of



documentation used under NEPA. The FHWA anticipates that it will publish notices for most environmental impact statement (EIS) projects and many environmental assessment (EA) projects. The FHWA does not expect that the notice process will normally be appropriate for projects that qualify as categorical exclusions (CEs) under NEPA.

The FHWA encourages efforts to help stakeholders and the public to understand this change in the law. For that reason, the FHWA believes that it would be useful to include a statement summarizing §139(l) in future NEPA documents. A sample appears below in response to Question 22.

The remainder of this interim guidance provides additional information on administration of the provisions of 23 USC §139(l) in a “question and answer” format. Sample forms accompany this interim guidance. The purpose of the samples is to assist the FHWA Divisions in preparing notices for Federal Register publication. The FHWA recommends that the Divisions coordinate with field counsel when preparing the notices.

### **1. What is the “limitations on claims” provision in 23 USC §139(l)?**

The limitation on claims provision establishes a category of final action by Federal agencies that can be made subject to a 180-day time limitation for seeking judicial review. The law applies only to Federal agency decisions on highway or public transportation capital projects. The law will provide certainty and predictability in the transportation decision-making process and for transportation program implementation. If a §139(l) notice is published in the Federal Register, declaring that there have been final Federal agency actions, then claims covered by the notice must be filed within 180 days after the date of the Federal Register notice. Note that a decision not to publish a §139(l) notice does not prevent an action from being final for other purposes.

### **2. What if the Federal law under which the action is taken sets a different length of time for filing an appeal?**

If the statute in question has a judicial review provision that contains a time period of less than 180 days, then the shorter time limit applies. If the statute in question has a judicial review provision that contains a time period greater than 180 days, then the 180-day time limit applies.

### **3. What if no §139(l) notice is published in the Federal Register?**

If the claim is for review of a Federal action under NEPA, then the limitation on claims that applies is 28 USC §2401. That law provides a claims period of six (6) years. The limitation on claims periods vary under other Federal laws.

In addition, sometimes the failure to act on a claim in a timely manner may prevent individuals from obtaining judicial review regardless of the time period for claims provided by statute. This principle, known as laches, may apply in cases where someone has acted on the Federal agency decision in a way that makes it unfair to change the outcome of the decision-making process (e.g., if physical construction of the project is underway).

### **4. Which Federal agency actions are included under the “permit, license, or approval” language of 23 USC §139(l)?**

A §139(l) notice can be used for any final action by a Federal agency that is required for a highway or public transportation capital project and is subject to judicial review. This includes



decisions of other Federal agencies that apply to the project or that the FHWA considers when making its own decisions in accordance with NEPA.

**5. How does the FHWA determine whether a decision is "final" within the meaning of 23 USC §139(l)?**

Generally, a Federal agency action is considered final if the agency has completed its decision-making process under the relevant law and the action is one that determines rights or obligations, or is an action from which legal consequences will flow. For example, when the FHWA signs a Record of Decision (ROD), that is the final action in the FHWA's decision-making process under NEPA with respect to issues such as project alternatives, potential environmental effects of the project, and avoidance and minimization of impacts.

In most instances, the FHWA Division will be able to determine finality for purposes of §139(l) based on its knowledge of the project and of the Federal agencies' decision-making processes. If questions arise in this area, the Division should consult with the FHWA Office of Chief Counsel before making a determination. Guidance will be issued if needed.

**6. What is required in order for the notice to apply to claims under Federal laws other than NEPA?**

While there is a presumption that the notice will cover all Federal agencies' actions that relate to the project and are within the scope of §139(l), the notice should expressly state that other Federal agencies have taken actions that are final under the governing laws. The key laws listed in the notice should include those under which the Federal agencies took final action. The sample forms and example that accompany this interim guidance illustrate these points.

**7. Does assignment of CE responsibilities under SAFETEA-LU §6004 or §6005, or assignment of other environmental responsibilities under §6005, change the process for the use of the limitation on claims provision?**

Because the SAFETEA-LU delegations substitute the State for the FHWA in the NEPA process, the 23 USC §139(l) notice will reflect the fact that the NEPA decision is issued by the State. Otherwise, the basic content requirements for the notice remain unchanged in the event of a §6004 or §6005 assignment. The FHWA will continue to be the party that arranges for publication of the notice in the Federal Register.

**8. Can a Federal agency publish a §139(l) notice for a project that has no Federal funding but does require decisions by Federal agencies as part of its permitting or review process?**

Yes, but only if there is a legal requirement for approval of the project by the Secretary of the Department of Transportation and the project is a highway project, a public transportation capital project, or a multimodal project. These requirements are set forth in the definition of "project" in 23 U.S.C. §139(a)(6). The Federal agency serving as the lead agency for NEPA would be the agency that would determine whether to publish a §139(l) notice for such project.

**9. Does §139(l) apply to permits, licenses, or approvals issued by State agencies that administer other Federal programs, such as the Floodplain Permit program?**

Section 139(l) applies only to Federal agency actions. If a State agency is acting as a Federal agency, as is the case under the §6004 SAFETEA-LU provisions for CEs, then §139(l) applies. If



the State agency is acting as a State agency under the authority of State laws, then §139(l) does not apply.

**10. Can the §139(l) notice process be used if project decision-making was completed prior to the effective date of SAFETEA-LU on August 10, 2005?**

Yes. Because publishing the notice will establish a reasonable period of time (180 days) prospectively for filing claims, it may be used for projects on which the NEPA decision was made prior to August 10, 2005. The 180-day period will run from the date the notice is published. As stated previously, the Division should work with field counsel to decide whether publication of a notice is a good choice for the project(s) in question.

If a Division wishes to publish notice for several projects that were approved before August 10, 2005, it may wish to use the multi-project sample form as a guide for consolidating the projects under a single notice.

**11. Does the limitation on claims provision apply to all NEPA categories of projects?**

The process can be used for any category of NEPA project that generates a documented decision. This includes documented CEs, EAs, and EISs. Before deciding to publish a notice, the FHWA Division, in consultation with the State, should consider whether publication is justified. This is further discussed below.

**12. How does the project's NEPA category (CE, EA, EIS) affect whether the notice should be used?**

The likely benefits of public notice, as well as the risk and potential effects of litigation, generally are different for each category. Most EIS projects will merit use of the §139(l) notice. EIS projects typically are substantial in size and complexity, and the potential effects of delay due to litigation will be the greatest. EA projects also may be likely candidates for a §139(l) notice, depending upon the nature of the project, the types of issues decided, the estimated likelihood of future litigation, and the potential effects of litigation. By contrast, the use of a §139(l) notice for a documented CE should be rare, and the FHWA anticipates that the notice will be appropriate only for a very limited number of documented CE projects.

**13. What kinds of factors should be considered when deciding whether to publish a §139(l) notice?**

The goal is to balance the benefits of providing notice to the public about the Federal government's decisions, against the costs of doing so. In all cases, it is important to consider the facts of the project when deciding whether to publish a notice. The Division must determine whether publication of the notice, which starts its own 180-day clock for claims, is the best course in light of all factors affecting the project. The FHWA recommends that Divisions work with their field counsel as they make these determinations.

For practitioners doing the risk analysis, it will be useful to examine the potential for litigation from several perspectives. If there are known interested parties threatening to file a lawsuit, then the notice may serve to ensure that such action occurs quickly. On the other hand, a notice may prompt some parties to sue merely to preserve their claims until they are more certain whether their interests are adversely affected by the Federal action. A notice may be very useful in cases where there are no known potential litigants, but where there are complex or controversial issues or impacts that may generate opposition in the future, as the project moves into an



implementation phase. A §139(l) notice will define the time period during which such “newly” interested parties must act on their views. If a project has no substantial known or likely opposition, then there may be little benefit from publication of a §139(l) notice.

**14. Can the limitation on claims process be used for tiered EISs?**

Yes, the §139(l) notice provision does apply to a tiered EIS to the extent that the tiered EIS results in final decisions. The FHWA is coordinating with other Federal agencies on this topic and will issue additional guidance, including a sample form, by February 2006.

**15. Can 23 USC §139(l) notices for several projects be consolidated for publishing as a single notice in the Federal Register to save time and costs?**

Nothing prohibits the consolidation of notices for multiple projects into a single Federal Register notice. This may be a cost effective approach if the Division is publishing several notices in the same time frame. A sample form for a consolidated notice accompanies this interim guidance.

**16. Who decides whether a limitation on claims notice gets published in the Federal Register?**

The decision whether to use the §139(l) notice process is one that the FHWA Division will make, in consultation with the State. For existing Federal Lands Highway projects, consultation should take place with the lead agency for NEPA, if it is an agency other than the FHWA. If Federal Lands has assumed joint lead agency responsibilities, the two agencies will decide together.

**17. What information should be included in a §139(l) limitation on claims notice?**

The notice must provide enough information to give the public reasonable notice of the general nature of the project and of the fact that there has been action by one or more Federal agencies that is final and subject to the 180-day limitation period. The notice should specify that claims will be barred at the end of the 180-day period, and state the legal authority for agency action and for the 180-day limitation. Notices often will cover actions by several Federal agencies and an array of agency decisions, rather than just the FHWA’s NEPA action. In such case, the notice should state that it applies to the actions of those other Federal agencies and to all laws under which Federal agencies took action. The sample forms and example that accompany this interim guidance contain language covering these points.

Other factors to consider in drafting a notice include how to identify the project in a way that the general public will understand, and how best to direct readers to one or more sources for detailed information about the project and the decisions made by the Federal agencies. Because the notice contains only very abbreviated information about a project, and the burden is placed on the readers to seek detailed information, the instructions for obtaining detailed information are especially important. Websites are an excellent resource for this purpose, although alternative means for obtaining information still will be important for those who do not have easy access to the Internet.

Section 139(l) notices must comply with Federal Register technical requirements. The sample forms reflect the necessary format. Some important points to remember:

1. A FHWA official with appropriate delegated authority must sign the notice. This is usually the Division Administrator (DA).



2. The "issuance date" must be the same date as when the notice actually is signed. Pre- and post-dating are not acceptable.
3. The person whose name is inserted in the signature block must be the person who signs the notice. It is not permissible to sign for another person.
4. The signatory must sign three (3) originals of the notice.
5. There should not be a page number on the first page of the notice.
6. There should be two spaces between the period at the end of one sentence, and the first letter at the beginning of the next sentence.

#### **18. How do the §139(l) sample forms work?**

The Divisions can use the sample forms as models when they prepare §139(l) notices under this interim guidance for an EIS, EA, or documented CE project. The sample forms include instructions (in bold and bracketed text) for inserting project-specific information into the notice. When using a sample form, the Divisions will need to exercise professional judgment about how to adapt the form to meet the needs of the project. The FHWA encourages the Divisions to work with their environmental specialist and their field counsel when questions arise about the appropriate content for a particular project notice. Those individuals, in turn, can consult with Headquarters representatives as needed.

One example of the judgment required is in completing the section that lists the primary Federal laws under which the Federal agencies have made final decisions on the project. While the purpose of the notice is to advise the public that actions have been taken that trigger the limitation period, the list of laws is intended to help inform readers about the types of matters decided by the Federal agencies. It is *not* intended to be an all-inclusive list of the laws relevant to Federal agency decision-making. For many projects, it may be appropriate to list only the key laws under which Federal agencies took their actions, such as the Federal-aid Highway Act, NEPA, 4(f), Section 106, and the Clean Air Act. In some situations, a more extensive list may be useful if other laws create the authority (or the obligation) for decisions that are potentially controversial, or are of high interest to major stakeholders or the general public. Appendix A to this interim guidance lists the laws that are most commonly involved in transportation decisions-making. The list is intended as a reference tool for those preparing §139(l) notices.

This guidance includes the following three types of sample forms: a single EIS project where all Federal agency decisions have been made; a notice covering a Federal agency decision made after the FHWA acted and issued an initial §139(l) notice; and a consolidated notice to cover multiple projects of varying NEPA categories. An example also is provided, showing a mock-up of an actual notice. As needed, the FHWA will issue additional sample forms to cover other types of situations.

#### **19. How much detail should be included in the notice's description of the project?**

The description of the project should be very brief and contain only the information that is critical to a reader's comprehension of the general nature of the project. For example, it is not



necessary to recite the history of the project or details about how or why decisions were made. The following examples illustrate an appropriate level of detail for project descriptions:

Example 1: Notice is hereby given that the FHWA and other Federal agencies have taken final agency actions by issuing licenses, permits, and approvals for the following highway project in the State of Illinois: U.S. Route 20 from Galena to Freeport in Jo Daviess and Stephenson Counties. The project will be a 79.8 km (49.7 mi) long, four-lane freeway with grade separations at all intersecting roadways (i.e. a fully access-controlled facility). It will begin northwest of Galena near the existing intersection of IL Route 84 and U.S. Route 20. It will then proceed to the north and east of Galena, south of the Galena Territory, along the north side of Tapley Woods, north of Elizabeth and Woodbine, north of Stockton and south of Lena. It will end northwest of Freeport, tying into the western end of the U.S. Route 20 Freeport Bypass. Except for the termini, which tie in along the existing U.S. Route 20, the entire proposed freeway will be on new alignment.

Example 2: Notice is hereby given that the FHWA and other Federal agencies have taken final agency actions by issuing licenses, permits, and approvals for the following highway project in the State of Wisconsin: WI-26 State Trunk Highway (STH) Improvements, Janesville at IH-90 to STH-60-East north of Watertown Road in Rock, Jefferson, and Dodge Counties. The project begins on the north side of Janesville at IH 90 and extends north about 48 miles (77 km) to about 9 miles (15 km) north of Watertown at STH 60-East. The proposed action involves upgrading the existing two-lane STH 26 corridor to a four-lane divided rural highway.

**20. How should publication of §139(l) notices be timed if 404 or other permits or approvals remain outstanding as of the date of the FHWA ROD, FONSI, or documented CE?**

A §139(l) notice will not be effective unless the Federal agency action covered by the notice qualifies as “final” within the meaning of §139(l). Usually, it will make sense to publish the §139(l) notice only when all Federal agency permits, licenses, and approvals are in place.

Exceptions may occur. For example, it may make sense to proceed with publication of the §139(l) notice immediately after the FHWA issues its ROD if the remaining Federal decisions are not expected to occur within a reasonable period of time. Another reason not to wait might be if the remaining Federal decisions pertain to non-controversial matters that no one is likely to litigate. Once the other Federal agencies have completed their decision-making processes, a decision can be made whether to publish an additional §139(l) notice.

If more than one notice is published for a project, the 180-day claims period will run separately for the Federal agency actions covered by each notice. For example, if a notice were published for a FHWA ROD on December 1, 2005, and for the project’s §404 permit on August 1, 2006, the 180-day period for the NEPA claim would be measured starting on December 1, 2005. The limitation period for the §404 permit would start on August 1, 2006.



**21. If a later notice is published for a separate permit (such as a 404 permit), and someone files a lawsuit challenging that permit, will that lawsuit open up the FHWA NEPA document for review even though an earlier §139(l) notice covered it?**

We do not think so, but this is likely to be the subject of debate until decided through litigation. In light of the language in §139(l), a prudent person contesting an action would assume that the Federal agency decisions covered in the first §139(l) notice could not be challenged in litigation following a §404 decision more than 180 days after the first notice.

**22. Should a reference to the limitation on claims provision be included in NEPA documents?**

The FHWA recommends, but will not require, that future NEPA documents include a statement setting forth the provisions in 23 USC §139(l) so that readers of the NEPA documentation are aware of the statutory provision and its effects. A sample §139(l) statement appears below.

*A Federal agency may publish a notice in the Federal Register, pursuant to 23 USC §139(l), indicating that one or more Federal agencies have taken final action on permits, licenses, or approvals for a transportation project. If such notice is published, claims seeking judicial review of those Federal agency actions will be barred unless such claims are filed within 180 days after the date of publication of the notice, or within such shorter time period as is specified in the Federal laws pursuant to which judicial review of the Federal agency action is allowed. If no notice is published, then the periods of time that otherwise are provided by the Federal laws governing such claims will apply.*

**23. Does the new limitation on claims provision affect how a project's administrative record is compiled?**

The limitation on claims provision increases the importance of effective documentation and tracking of governmental agency decisions. It also will be important to ensure that copies of the decisions and supporting documents for actions taken by other Federal agencies are included in the FHWA administrative record, even if those agencies acted after the FHWA NEPA decision. This is because the §139(l) notice will direct readers to the FHWA's records for information on all of the decisions relating to the project.

In some cases, it may be useful to consider ways to make it easier for readers of NEPA documents to understand what Federal decisions are made in connection with the project. It also will be helpful to evaluate how effectively the NEPA documentation informs readers of the status of various Federal agency decisions as of the time the NEPA documents are issued.

A §139(l) notice will direct interested parties to the FHWA and the State for information about the project and the project-related actions of various Federal agencies. For this reason, it will be very important that both agencies have project records readily available for public inspection as of the date of the publication of the notice.

**24. How is publication in the Federal Register handled? How does publication work in States that receive assigned powers under SAFETEA-LU §6004 or §6005?**

The publication of the §139(l) notice should follow the same process used for authorization and publication of a notice of intent under NEPA. This applies regardless of §6004 or §6005 status. The FHWA always must handle publication of the notice in the Federal Register.

**25. Who pays for the notices?**

Presently, the cost of notices is paid from general operating expense funds of the FHWA. The FHWA is developing a procedure to treat payment for notices as an eligible project cost, so that FHWA would be reimbursed by the States. FHWA will issue guidance on that procedure by January 2006.

Questions on this guidance may be addressed to Pam Stephenson, at [Pamela.Stephenson@fhwa.dot.gov](mailto:Pamela.Stephenson@fhwa.dot.gov) or tel. (202) 366-2062, or Janet Myers at [Janet.Myers@fhwa.dot.gov](mailto:Janet.Myers@fhwa.dot.gov) or tel. (202) 366-2019.

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**Attachments:**

Appendix A - Reference List of Typical Laws and Executive Orders  
Sample Forms (3)  
Example (1)